RECENT DECISIONS.

AGENCY—RATIFICATION—UNDISCLOSED PRINCIPAL. *Held*, a contract made by one in his own name, but intending it to be for another, without authority from that other, cannot be ratified. *Keighley Maxted & Co.* v. *Durant* (1901) A. C. 240. See NOTES, p. 544.

CARRIERS—TICKETS—FALSE IMPRISONMENT. The plaintiff presented an unused portion of an excursion ticket, reading "New York to Newark," for passage from Newark to New York. It was refused by the defendant's conductor. The plaintiff declined to pay his fare in cash, and left the ticket in the car. The conductor then caused the plaintiff's arrest. The plaintiff later brought action for assault and battery and false imprisonment. The defendant supported the conductor's action under the statute (Gen. St., p. 2668), providing for the apprehension of those attempting railroad travel "with intent to avoid payment thereof." The plaintiff denied such intent, and offered to prove a custom of the railroad to accept ticket as offered. *Held*, proof of custom, modifying conditions of ticket, should have been admitted as evidence tending to show that the plaintiff might have relied on such custom and lacked intent to avoid payment of fare. *Tiedy* v. *Erie R. Co.*, 49 Atl. 427 (N. J. June, 1901).

The statute had previously been before the court in *Harris* v. *Central R. R. Co.*, 58 N. J. L. 282 (1895). It was there declared penal, construed strictly and "intent to avoid payment" held necessary to recovery under it.

Tickets are usually merely receipts or tokens to enable carriers' agents to recognize the bearers as persons entitled to be dealt with in certain ways. Generally they are not contracts. Parol evidence may modify them. *Quimby* v. *Vanderbilt*, 17 N. Y. 306 (1858); *Rawson* v. *P. R. R. Co.*, 48 N. Y. 212 (1872); *Nevins* v. *Bay State Steamboat Co.*, 4 Bosw. 234; *Runyan* v. *C. R. R. Co.*, 61 N. J. L. 537 (1898). Contracts may be proved independently of the terms of the ordinary ticket. Thompson on Carriers of Passengers, 65. Such evidence is generally inadmissible, where the ticket is a so-called "contract" ticket, especially when signed by the passenger. *Fonseca* v. *Cunard S. S. Co.*, 153 Mass. 553 (1891); Lawson on Usages and Customs, 228. Evidence may be introduced to show that, by custom, a common carrier includes in his liability more than is strictly admissible at common law. *Kemp* v. *Coughtry*, 11 Johns. 107 (1814); *Harrington* v. *M'Shane*, 2 Watts 443 (1834).

CONSTITUTIONAL LAW—"DUE PROCESS" IN THE NEW YORK ANTI-MONOPOLY LAW. Laws of 1899, c. 690, providing that, when the attorney-general shall have determined to bring an action for violation of the prohibition against monopolies in commodities of common use, any justice of the Supreme Court to whom the application is made shall grant an order for witnesses to be examined and to produce records relating thereto, is constitutional. *Matter of Davies*, 168 N. Y. 89; 61 N. E. 118 (Oct. 1901).

The validity of such statutes as this has ordinarily been objected to as the result of the refusal of a witness to answer questions which he thought tended to incriminate him. *Counselman* v. *Hitchcock*, 142 U. S. 547 (1890). But, since the insertion of an express provision that that fact should not excuse a witness from testifying, it being also provided that testimony so obtained should never be used against him, statutes in this form have been upheld by the Supreme Court. *Brown* v. *Walker*, 161 U. S. 591 (1895). In New York they have never been open to this objection since the decision in *People* v. *Kelly*, 24 N. Y 74 (1861). It seems very doubtful whether any legislative assurance against future prosecution altogether satisfies the constitutional requirement that no person shall "be compelled, in any criminal case, to be a witness against himself," but

the point must be regarded as settled. Aside from that, there is little reason to question the validity of the procedure provided by this act. *Interstate Commerce Comm.* v. *Brimson*, 154 U. S. 447 (1893). A Justice of the Supreme Court, under it, must perform the judicial function of determining whether the Attorney-General's application is properly made; and the Court necessarily has power to examine witnesses in an action itself, or through a referee, in the course of a reasonable inquiry, in pursuance of express legislative authority.

CONSTITUTIONAL LAW—NEW YORK TICKET-SCALPING LAWS. *Held*, an act of the legislature (Laws of 1901, c. 639) prohibiting the sale of passenger tickets except by the authorized agents of the company over whose road the ticket reads, is unconstitutional. *People ex rel. Fleischmann* v. *Caldwell*, 71 N. Y. Supp. 654 (App. Div. July, 1901).

Laws of 1897, c. 506, is substantially the same as the act involved in the principal case, except that by the former act the authorized agent of one company might purchase tickets for its patrons from the authorized agents of another company. This act was declared unconstitutional in *People ex rel. Tyroler* v. *Warden of Prison*, 157 N. Y. 116 (1898), on the ground that it infringed the right of the citizen to engage in a lawful business. N. Y. State Cons., Art. 1, Sec. 1. Upon that case the decision in the principal case is based, It seems clear that each company need only constitute the agents of other companies its own agents and all the objections to the previous act may be raised to this later one. Upon the authority of the *Tyroler* case, *supra*, the principal case seems to be correct. It is interesting to note, however, that the view of the New York courts in these cases is opposed to that of the courts of many other States where similar acts have been passed. *Com.* v. *Keary*, 48 Atl. 472 (Penn. 1901); *Fry* v. *State*, 63 Ind. 552 (1878); *Burdick* v. *People*, 149 Ill. 600 (1894); *Railroad* v. *McConnell*, 82 Fed. 65 (C. C. Tenn. 1897).

CONSTITUTIONAL LAW—POLICE POWER—GAME LAWS. A State statute prohibiting the possession and sale of game of certain kinds during the closed season was *held* to apply game lawfully captured outside the State and not to violate the Federal Constitution. *In re Deininger*, 108 Fed. 623 (Oreg., April, 1901). See NOTES, p. 548.

CONSTITUTIONAL LAW—VESTED RIGHTS. A California statute created a fund for the payment of $1,000 to the widows of policemen. *Held*, on the death of a policeman his widow had a vested right to $1,000, which the repeal of the statute could not affect. *Kavanagh* v. *Board of Police Pension Fund Com'rs*, 66 Pac. 36 (Cal. Aug. 1901).

There is here no contract between the State and the plaintiff. Were such the case her right to recover would be clear. *Steamship Co.* v. *Jolliffe*, 2 Wall. 450 (U. S. 1860); *Salt Co.* v. *East Saginaw*, 13 Wall. 373 (U. S. 1871). And where the right of action does not grow out of a contract, but is dependent upon a statute, it ceases and determines with the statute upon which it depends. *U. S.* v. *Morris*, 10 Wheaton, 246 (U. S. 1825); *Butler* v. *Pennsylvania*, 10 How. 402 (U. S. 1850); *Conner* v. *Mayor of New York*, 2 Sand. 355 (N. Y. 1849); *People* v. *Roper*, 35 N. Y. 629 (1866).

The opinion cites but one authority in support of its position. *Pennie* v. *Reis*, 132 U. S. 471 (1889). That case did not involve the point here under discussion, though there is a *dictum* in the opinion supporting the decision in the principal case.

CONTRACTS—DEFENSE OF MAINTENANCE AND CHAMPERTY. An agreement by one not a lawyer to assist infant heirs, to whom he was not related, in contesting a will in consideration of receiving a sum equal to a certain part of what might be recovered, was *held* void under the common law rule against maintenance. *Lynn* v. *Moss*, 62 S. W. 712 (Ky. May, 1901).

It is generally held that the reasons upon which the ancient doctrine of maintenance rested have never existed in the United States. *Schomp* v. *Schenck*, 40 N. J. L. 195 (1878); *Richardson* v. *Rowland*, 40 Conn.

565 (1873); *Wright* v. *Meek*, 3 G. Greene, 472 (Ia. 1852). The point was squarely decided in New York in *Sedgwick* v. *Staunton*, 14 N. Y. 289 (1856), where it was held that "not a vestige of the law of maintenance, including that of champerty, now remains in this State, except what is contained in the Revised Statutes." Approved in *Fowler* v. *Callan*, 102 N. Y. 395 (1886). The doctrine of the principal case has, however, been upheld recently in Minnesota. *Gammons* v. *Gulbrauson*, 80 N. W. 779 (Minn, 1899).

CORPORATIONS—REVIVAL OF ACTION FOR LIBEL AGAINST TRUSTEES AFTER DISSOLUTION OF CORPORATION. Where an action for libel against a corporation had abated by reason of the termination of the existence of the corporation by the limitation in its charter, *held*, such action might be revived against the directors of the corporation at the time of its dissolution, as trustees. *Shayne* v. *Evening Post Publishing Co.*, 168 N. Y. 70 (Oct. 1901), 61 N. E. 115. See NOTES, p. 542.

CRIMINAL LAW—CONTEMPT—JURISDICTION. An attorney who was brought into court under an illegal arrest, protested angrily against his arrest and refused to obey orders of the court, was adjudged guilty of contempt. On *habeas corpus* proceedings it was *held*, since the writ of attachment was void, the Court at no time rightfully obtained jurisdiction over his person and the mere fact that he may have exhibited anger or indignation at the unwarranted arrest did not constitute contempt. *Ex parte Duncan*, 62 S. W. 758 (Tex. April, 1901).

An attorney as an officer of the court is always within its jurisdiction. Bishop, Crim. Law, II., § 254. Moreover, a court has the right to maintain order and uphold its dignity, even in a case which must ultimately be dismissed for want of jurisdiction. *Ex parte Stickney et al.*, 40 Ala. 168 (1866). In such a case neither a party nor an officer nor any other person can safely insult the court or resist its order. *Passmore Williamson's Case*, 26 Pa. St. 9 (1855); *People* v. *McKane*, 78 Hun 154, 161 (1894). As was pointed out by HENDERSON, J., in dissenting from the decision in the principle case, "it does not matter how he was brought into court. The court then had jurisdiction of him, and he was bound to be respectful to the court."

CRIMINAL LAW - HOMICIDE—REDUCTION OF CRIME. The defendant finding his wife in company with the deceased under circumstances that gave rise to the belief that adultery was being committed, shot and killed her supposed paramour. *Held*, belief by the husband that his wife was committing adultery, provided such belief was reasonable, was sufficient provocation to reduce the crime of killing her supposed paramour from murder to manslaughter. *State* v. *Yanz*, 50 Atl. 37 (Conn. Sept. 1901).

This decision is to be supported. The test of provocation is whether the conduct of the party killed was such as the law would deem sufficient to excite passions beyond control. Bishop, New Criminal Law, vol. II. § 710; *Preston* v. *State*, 25 Miss. 383. The law adjudges adultery to be sufficient provocation to reduce the killing of a wife's paramour by the husband from murder to manslaughter, on the ground that the wife's adultery is calculated to excite the husband to anger beyond control. *Bishop, supra; Com.* v. *Whittler*, 2 Brewster, 388 (1868). As adultery produces such madness as to remove the peculiar state of mind necessary in murder, it inevitably follows that belief—where circumstances justify such belief—that adultery is being committed is likewise calculated to incite passion beyond control. *Price* v. *State*, 18 Tex. App. 474 (1885); *State* v. *Pratt*, Houston Del. Rep. Cr. 249 (1867) It is immaterial to the state of mind at the moment of killing whether this reasonable belief is subsequently proved false. The assenting opinion is supported by an Alabama decision, *State* v. *Hoaks*, 13 Southern 767 (Ala., 1893).

DOMESTIC RELATIONS—HUSBAND AND WIFE—AGREEMENT FOR SEPARATION. An agreement to separate was made by husband and wife by which, in addition to living apart, they agreed to relinquish the rights each possessed

in the property of the other. After the wife's death, the husband, the plaintiff, sought to recover his interest in her property. *Held*, the agreement for separation was illegal and entire and a collateral undertaking to relinquish property rights was therefore void, the illegality tainting the entire agreement. *Foote* v. *Nickerson*, 48 Atl. 1088 (N. H. March, 1901).

This decision is in opposition to the modern English rule which enforces agreements for separation as well as collateral undertakings, as separate maintenance of wife, custody of child, etc. Bishop, Marriage and Divorce, Vol. I, § 1264; *Besant* v. *Wood*, 12 Ch. D. 605 (1879). It is also opposed to the weight of American authority. The general doctrine in America, following the old English rule, refuses to recognize as valid agreements for separation made with or without trustees—*Tourney* v. *Sinclair*, 3 How. 324 (Miss. 1828); *McKennan* v. *Phillips*, 6 Wharton, 571 (1828)—but will enforce collateral undertakings in such agreements. *Thomas* v. *Brown*, 10 Ohio St. (1859); *Wallace* v. *Basset*, 41 Barb. 92 (1863); *Pettit* v. *Pettit*, 107 N. Y. 677 (1887).

DOMESTIC RELATIONS—HUSBAND AND WIFE—PRESUMPTION OF TRUST. Where a married woman, who by statute may contract as sole even with her husband, gave her husband her marriage portion, which he used in his business, *held*, a presumption of a trust in her favor arose and she might prove her claim before creditors in absence of fraud. *In re Nieman*, 109 Fed. 113 (Wis. May, 1901).

The rule of the principal case has long obtained in courts of equity. 2 Lewin Trusts 778; Story Eq. Juris. § 1395; *Jones* v. *Davenport*, 13 Atl. 652 (N. J. Eq. 1888). As long as the common law disabilities of coverture continued, courts of law held that the presumption was in favor of a gift. *Jacobs* v. *Hesler*, 113 Mass. 157 (1873). But the married woman's acts have been generally construed in accordance with the decision in the principal case. *Bergey's Appeal*, 60 Pa. St. 408 (1869); *Stickney* v. *Stickney*, 131 U. S. 227 (1889); *Parett* v. *Palmer*, 35 N. E. 713 (Ind. 1893). The effect of these decisions is only to apply the same presumption where the parties are husband and wife, that would exist were the money deposited under similar circumstances with a third party. *Chadbourne* v. *Williams et al.*, 47 N. W. 812 (Minn. 1891).

EVIDENCE—ADMISSIONS. Statements were made in the presence of the accused by his brother at the time of arrest. *Held*, these, together with the remarks of the officer, were admissible, as well as the fact that the accused did not deny or correct such statements. *People* v. *Wennerholm*, 60 N. E. 259 (N. Y. 1901).

This represents a line of cases much discussed and difficult of decision, an exception to the hearsay rule of evidence. In the early cases the courts proceed with extreme caution and hesitate to accept mere silence as an admission. *Child* v. *Grace*, 2 C. & P. 193; *Carter* v. *Buchannon*, 3 Ga. 513 (1847); *Rolfe* v. *Rolfe*, 10 Ga. 143 (1851). The fact of no reply where a direct accusation of crime is made was admitted in *Puett* v. *Beard*, 86 Ind. 104 (1882).

The Court in *People* v. *Koerner*, 154 N. Y. 355 (1897), admitted such evidence where the accused had full liberty to make answer and comprehended the effect of the words spoken, and under the circumstances would naturally have replied had he not acquiesced.

The principal case is distinguishable from *People* v. *Kennedy*, 164 N. Y. 449 (1900), where this kind of evidence was not admitted, and is further to be distinguished from cases like *Perry* v. *Johnston*, 59 Ala. 648 (1877), where the statements were made by strangers, with whom the accused had no connection.

EVIDENCE—ADMISSIBILITY OF CONFESSION—THREAT BY OFFICERS. Where the defendant, being indicted for larceny, was told by the officer who had arrested him, "If you have stolen the cotton, it will be better for you to tell the truth about it," and defendant confessed, *held*, such confession was voluntary and admissible in evidence against the defendant. *Huffman* v. *State*, 30 So. 394 (Ala. May, 1901).

To invalidate a confession it must be given in consequence of an inducement, threat or promise made by a person in authority, the reason being that it would not be safe to accept a statement made under any influence or fear. *Regina* v. *Baldry*, 2 Den. C. C. 430 (1852). Consequently, where a confession is made in reliance on some promised advantage or plainly expressed threat, no question can arise. But when we reach a case where the party accused is told that it would be better to tell the truth, we find conflicting decisions. One line of cases, followed in the principal case, holds that under such circumstances no advantage or threat is implied. In other words, that it is a matter of perfect indifference whether or not the prisoner confesses. *King* v. *State*, 40 Ala. 314 (1867). This, however, assumes that the prisoner will look at the matter in a similar way, whereas, the logical conclusion on his part is that "it will be better for you" contains a veiled threat. Such reasoning looks to the state of mind of the party extorting the confussion and is a poor guide. The other line of cases holds that a confession made under circumstances on all fours with the principal case is not voluntary, and hence inadmissible. The confession is to be excluded, not because it was improperly obtained, but on the ground that it is unreliable because of the difficulty of estimating the degree of influence produced on the prisoner. Moreover it is necessary to put some check on the zeal of officers who try to secure the conviction of a prisoner, and the slightest evidence of inducements or threats on the part of the party securing the confession should invalidate such confession. *People* v. *Phillips*, 42 N. Y. 200 (1870). In the Phillips case the officer told the prisoner that he had better confess, and, as was said by FOSTER, J., p. 203, "* * * the language of the officer to the prisoner, * * * which led to his confessions came clearly within the rule and were inducements for the confessions, which relieve them from being voluntary." A confession obtained by similar means in the case of *People* v. *Thompson*, 84 Cal. 598 (1890), was excluded.

It is of interest to note that § 395 of the New York Code of Criminal Procedure providing that "A confession of a defendant * * * can be given in evidence against him, unless made under the influence of fear produced by threats or, unless made upon a stipulation of the District Attorney, that he shall not be prosecuted therefor," has in no way changed the law on this subject, *People* v. *Mondon*, 103 N. Y. 211 (1886), at p. 219, and that the rule as laid down in the Phillips case, *supra*, is still the law in this State.

MORTGAGES—FORECLOSURE—REDEMPTION. Testatrix devised two lots, covered by the same mortgage, lot 10 to A, lot 11 to the defendant; but charged the payment of the whole mortgage debt on lot 10. The mortgage was foreclosed, the will and the condition thereof appearing in the bill. The plaintiff, a judgment creditor of A, redeemed both lots. *Held*, he acquired no title to lot 11, for he had no right to redeem it, not being a judgment creditor of the defendant; and, since his equities were those of his judgment debtor, he had no claim to contribution from the defendant. *Huber* v. *Hess*, 61 N. E. 61 (Ill. June, 1901).

The plaintiff's only right to redeem the premises in question was founded on the Illinois statute giving the judgment creditor such right. His title was derived from A. A was bound in law, if the payment of the whole mortgage claim were a condition of the devise to her, and in equity if it were a charge on the estate, to pay the whole mortgage claim. If the devise was on condition, the plaintiff took subject to that condition, Ed.; was bound to pay the whole mortgage debt. 4 Kent's Com. 126, 13th ed., *Hodgeboom* v. *Hall*, 24 Wend, 146 (1840), or forfeit the estate. If the devise contained an equitable charge, the plaintiff took with notice thereof, purchasing at a judicial sale, *Lessee of Smith* v. *McCann*, 24 How. 398 (U. S. 1860); *Stith* v. *Lookabill*, 71 N. C 25 (1874), and is, therefore, subject to the charge and liable in equity to pay the whole mortgage debt. *Gardner* v. *Gardner*, 12 Wheat. 498 (U. S 1827); *Taft* v. *Morse*, 4 Met. 523 (Mass. 1842). In neither case has he any equitable claim to contribution against the defendant.

NEGOTIABLE INSTRUMENTS—CONFLICT OF LAWS. A married woman domiciled in New Jersey drew a note to her husband's order. He carried it into New York and there negotiated it. *Held*, the indorsee suing in New Jersey could recover in a suit against the maker. *Thompson* v. *Taylor*, 49 Atl. 544 (N. J. June, 1901).

A contract is governed by the *lex loci contractus*, not by the *lex fori*, and this has been held to apply to contracts of married women made outside of the State of their domicile, where such contracts are void. *Milliken* v. *Pratt*, 125 Mass. 374 (1878). The only doubt in the present case is whether the defendant ever made a contract in New York.

Touching this point, it has been held in many cases that where a note is made in one State for the purpose of being negotiated in another, it comes into legal existence when and where negotiated and is thereafter enforcible, even though, had such negotiation not occurred, it would have been void in the jurisdiction where it was actually drawn. *Campbell* v. *Nichols*, 33 N. J. Law, 81 (1868). How far such intention was manifested in the principal case is not shown in the report. Whether the mere absence of a contrary intention is sufficient, is a point on which there seems to be little direct authority Considering the reason for the general rule, viz., to strengthen the validity of negotiable instruments in the hands of holders for value, the question may be answered in the affirmative as being a probable and logical development of the general doctrine.

NEGOTIABLE INSTRUMENTS—TIME OF PAYMENT. The plaintiff sued on a note promising payment "within one year after date." *Held*, this stated the time of payment with certainty sufficient to render it a valid, negotiable promissory note. *Leader* v. *Plante*, 50 Atl. 54 (Me. July, 1901).

This decision seems sound, and is supported in many jurisdictions. *Matteson* v. *Marks*, 31 Mich. 423 (1875); *Curtis* v. *Horn*, 58 N. H. 504 (1878). The Massachusetts doctrine, though originally the same, *Cota* v. *Buck*, 7 Metc. 588 (1844), is now different. In *Way* v. *Smith*, 111 Mass. 523 (1873), such provision was held to render the "contract uncertain and contingent, both as to the time of payment and amount to be paid." It seems clear that business usage supports the general rule. The negotiability of the note is no more impaired than by a provision to pay on demand. There is sufficient certainty if the time of payment is certain to come.

REAL PROPERTY—LATERAL SUPPORT OF SUBMERGED LAND. The defendant, the owner of a pier extending into New York Bay, was, by grant from the State, given adjoining land, lying under the water. Upon dredging this land, in order to build a dry dock, the loose soil and mud on which the neighboring pier of the plaintiff was erected, slipped and shifted, causing damage to the pier. *Held*, the plaintiff could not recover because the right to lateral support did not apply to lands lying under water. *White* v. *Nassau Trust Co.*, 61 N. E. 169 (N. Y. Oct. 1901).

This decision, to the effect that the rule as to lateral support does not apply to lands covered by water, while novel, seems to be reasonable. As pointed out by the Court, the soil at the bottom of the bay is loose and liable to shift owing to the flow of the tides. Under such conditions the rule would be harmful, in that it would interfere with improvements made in the interests of the public. But the Court, in deciding the case, went even further, for it held that plaintiff could not recover even if he were entitled to lateral support. It reached this result on the ground that the weight of the plaintiff's pier required an increased amount of lateral support. If this had been the case the decision of the Court would have been correct, *Lasala* v. *Holbrook*, 4 Paige, 169 (1833); *Gilmore* v. *Driscoll*, 122 Mass. 201 (1877), but the Appellate Division found, *White* v. *Tebo*, 43 App. Div. 418, at p. 421, that the plaintiff's pier did not increase the pressure upon the defendant's soil—a finding of fact which was not subject to review by the Court of Appeals. If, as was the case, the pier did not increase the pressure on the defendant's soil, the case could be sustained by the application of the English doctrine, that where the injury to the soil is inappreciable no recovery can be had for damage to

the structures upon it, since the right to lateral support is relative, and the infringement of it without appreciable damage does not give rise to a cause of action. *Smith* v. *Thackerah*, L. R. 1 C. P. 564 (1866). In the principal case, the damage to the soil in its natural state was inappreciable, and in view of that fact plaintiff was not entitled to recover damages.

REAL PROPERTY—EVICTION—ABANDONMENT BY LESSEE. Where the defendant was lessee of certain premises of the plaintiff and abandoned the same within her term and the plaintiff relet a portion of the premises to a third party, *held*, this reletting did not prevent the plaintiff from recovering from the defendant rent for that portion of the premises not relet. *Dolton* v. *State*, 49 Atl. 679 (N. J. June, 1901).

To reach the result obtained in this case certain jurisdictions have refused to admit that such a reletting is an eviction. It is said to be a reletting "for and on account of" the tenant, who, accordingly, is entitled to a credit for the amount so obtained. *Brown* v. *Cairns*, 77 N. W. 478 (Ia. 1898). This construction of such a reletting is wrong in principle, if it does not actually rest on a violation of the Statute of Frauds, *Smith* v. *Kerr*, 108 N. Y. 31 (1888), although the conclusion reached upon it is logical.

In the present case the Court admits that the action of the plaintiff was, "in a legal sense, an eviction," but insists that, as the eviction was "constructive merely," it should impose upon the plaintiff "no penalty other than that of crediting the tenant with the sum so earned by the property during the term." This is a novel theory. Why a tenant may avoid liability for rent by showing that certain acts of his landlord have amounted constructively to an eviction—that is, to an essential term of the lease—is reasonably evident. *Dyett* v. *Pendleton*, 8 Cowen, 727 (1826); *Silber* v. *Larkin*, 68 N. W. 406 (Wis. 1896). But why a landlord may still be allowed to hold his tenant for rent when his act confessedly constitutes even a constructive eviction is obscure. *Lawrence* v. *French*, 25 Wend. 443 (1841); *Christopher* v. *Austin*, 11 N. Y. 216 (1854); *Gray* v. *Kaufmann Dairy Co.*, 162 N. Y. 388 (1900).

REAL PROPERTY—REMAINDERS—"SURVIVORSHIP." Where there was a devise to A for life and at the time of her decease to her surviving children, their heirs and assigns, *held*, the words of survivorship referred to the testator's death and the children acquired a vested remainder. *In re Twaddell*, 110 Fed. 145 (Pa. Sep. 1901).

It was a settled construction of the early law that words of survivorship, even where the gift was not immediate, applied to the testators' death, *Wilson* v. *Bayly*, 3 Bro. P. C. 195 (1760), on the ground that there was no other mode of reconciling such language with words of severance creating a tenancy in common and that the law favored vesting of estates. This technical rule, opposed to the ordinary meaning of words, was variously limited. *Hill* v. *Rockingham Bank*, 44 N. H. 567 (1863), and cases there cited. In *Cripps* v. *Wolcott*, 4 Madd. 11 (1819), the words were construed to refer to the time of distribution, and though this decision was long held to apply to personalty, the law was similarly fixed in regard to realty in *Matter of Greyson's Estate*, 2 D. J. & S. 428 (1864), overruling *Doe* v. *Prigg*, 8 B. & Cr. 231 (1828), where the devise was to a class as in the principal case. The early rule was adopted in New York.

REAL PROPERTY—RIGHT TO WHARF OUT—LICENSE. The plaintiff, a riparian owner, built wharves extending to the navigable part of the Mobile River, the City of Mobile having knowledge of the fact and regulating the manner in which such wharves should be built. *Held*, the City of Mobile could assert no claim to the submerged land whereon the wharves were built, so as to dispossess the plaintiff. *Sullivan Timber Co.* v. *City of Mobile*, 110 Fed. 186 (Ala. Oct. 1901). See NOTES, p. 547.

REAL PROPERTY—RIPARIAN RIGHTS—COMPENSATION. The plaintiff, an owner of uplands on the Harlem River, was possessed of certain riparian rights in a tideway of the river, which the City of New York filled and converted to the use of the public as a driveway. The plaintiff sought

to recover compensation for the loss of his riparian rights. *Held*, though the city might appropriate the tideway for the purpose of improving navigation, without compensation being made to the owner, for the loss of his rights, there must be compensation when the tideway was appropriated by the city for other purposes. *In re City of New York*, 61 N. E. 158 (N. Y. Oct. 1901). See NOTES, p. 561.

REAL PROPERTY—WATER RIGHTS—PRESCRIPTION AGAINST MUNICIPAL CORPORATION. The defendant was the borough in which the plaintiff resided. The plaintiff owned premises supplied with water from a pipe connected with the defendants' system of water works. Claiming a right to the free use of such water, the plaintiff, under such claim, used it notoriously, peaceably, and continuously for a period of more than twenty-one years. *Held*, the plaintiff acquired a prescriptive right to the free use of such water. *Kearney* v. *Borough of Westchester*, 49 Atl. 227 (Pa. May, 1901).

The decision is correct. A right to use water from the pipe of a water supply company may become appurtenant to the land supplied and pass as such, *Coolidge* v. *Hugar*, 43 Vt. 9 (1870), and it is fundamental that appurtenant rights may be acquired by prescription.

The doctrine that the Statute of Limitations does not run against the State, has no application to a municipal corporation engaged in a private business in which the public as such has no rights. *Evans* v. *Erie County*, 66 Pa. 222 (1870).

REAL PROPERTY—WATERCOURSES—DRAINAGE. The defendant drained water from his swamp into a river running through his land, thereby flooding the property of the plaintiff, an adjoining riparian owner.

In a suit to recover damages for the injury, *held*, the defendant's common law right of drainage was not limited to the capacity of the natural outlet. *Mizell* v. *McGowan*, 39 S. E. 729 (N. C. Oct. 1901).

According to a well-settled rule of law, the owner of land abutting on a stream may, by draining into it, increase or accelerate its flow, provided the volume of water is not increased beyond the natural capacity of the stream to discharge it. *McCormick* v. *Horan*, 81 N. Y. 86 (1880); *Wheeler* v. *Worcester*, 10 Allen 591 (1865). In the principal case the Court admits that the decision is in conflict with the weight of authority, but contends that its holding is rendered necessary by the peculiar conditions which exist within the jurisdiction—the vast area of uncultivated swamp lands. Hence the reaffirmance of the rule laid down in *Jenkins* v. *Railroad*, 110 N. C. 438 (1892); *Mizell* v. *McGowan*, 120 N. C. 134 (1897).

STATUTES—DEPOSITION—COMPETENCY OF EVIDENCE. The defendant, being sued by the plaintiff for the balance of an open account, interposed a counterclaim, to prove which he introduced at the trial the deposition of a witness taken out of the State under §§ 887–892 of the Code of Civil Procedure. In this deposition the witness gave "opinions and conclusions." The plaintiff duly excepted to the admission of this evidence, but the trial judge overruled the objection on the ground that, though the evidence would not have been competent had the witness been on the stand, it was admissible because the plaintiff had waived his right to object at the trial by his failure either to object to the interrogatories or to move to suppress the commission. Upon appeal it was *held*, § 911 of the Code of Civil Procedure provided that the evidence contained in such a deposition is open to the same objections as if the witness himself were on the stand, and, therefore, the ruling of the trial judge was error. *Wanamaker* v. *Megraw*, 61 N. E. 112 (N. Y. Oct. 1901).

In view of the plain language of § 911, it would seem that the decision is clearly right. Three of the seven judges, however, dissented, without giving their reasons. For interpretations of similar statutes in other states, see *Burton* v. *Baldwin*, 61 Ia. 283 (1883); *The Central Railroad and Banking Co.* v. *Gamble*, 77 Ga. 584 (1886); *Moody* v. *A. G. S. R. Co.*, 99 Ala. 553 (1892).

STATUTES—ENGLISH TRADE UNION ACTS—RIGHT TO SUE TRADE UNION IN REGISTERED NAME.—The Trade Union Acts, 1871 and 1876, legalize

the formation of unions and, among other things, provide for their registration and for the vesting of their property in trustees, who are authorized to bring or defend any suits relating to such property. In an action against the defendant union in its registered name and against several of its officers for unlawful picketing, an injunction and damages were demanded. The society moved to be dismissed from the action on the ground that it could not be sued in its registered name. *Held*, the action was properly brought. *Taff Vale Railway Co.* v. *Amalgamated Society of Railway Servants* [1901] A. C. 426. See NOTES, p. 546.

STATUTES—N. Y. LAWS OF 1899, c. 700. The N. Y. Laws of 1899, c. 700, provides, in substance, for the payment, by issue of city or county revenue bonds, of the reasonable expenses incurred by a city or county official in defending himself successfully in any action to remove him from office for a violation of official duties. The plaintiff, a police officer of the defendant city, having defended himself successfully in such an action sought reimbursement, under this act, from the defendant for expenses so incurred. *Held*, the act, in so far as it attempted to give the plaintiff the relief sought, was in violation of Art. 8, Sec. 10 of the N. Y. Constitution, which provides that "no county, city, town or village shall hereafter give any money or property, or loan its money or credit to or in aid of any individual * * * nor shall any such county, city, * * * be allowed to incur any indebtedness except for county, city * * * purposes," and was therefore void. *Chapman* v. *City of New York*, 61 N. E. 108 (N. Y. Oct. 1901).

That the act in question sought to compel the defendant city to incur an indebtedness for other than city purposes is manifest. The decision is of interest because it determines that the N. Y. Constitution embodies the common law rule that "when a citizen accepts a public office he assumes the risk of defending himself against unfounded accusations at his own expense."

STATUTES—PENAL PROVISIONS. The plaintiff sued under a statute allowing the owner of land to recover treble damages for the wilful cutting of timber. The defendant pleaded in bar *Gen. St. Conn.*, *1888*, § *1379*, which provides that no suit for forfeiture on any penal statute shall be brought after one year from the commission of the offense. *Held*, such a statute was not penal, and the limiting statute did not run against the plaintiff. *Plumb* v. *Griffin*, 50 Atl. 1 (Conn. Sept. 1901).

The Court must be understood as holding squarely that no statutes are strictly and properly penal except those giving a right of action to the State, and as excluding from that definition those statutes which merely give the injured party a right to increased damages in a private action against the wrongdoer. The cases cited sufficiently support the decision. *Ross* v. *Bruce*, 1 Day, 100 (1803); *Le Forest* v. *Tolman*, 117 Mass. 109 (1875).

Some apparently contrary holdings are explained by the fact that the courts in dealing with cases under statutes, giving such right to increased damages, have referred to them loosely as "penal statutes." In no case, however, has such language been a part of or necessary to the decision.

TRUSTS—DUTY TO KEEP TRUST FUNDS SEPARATE—INTEREST. Upon a sale of land in 1867 the defendants' testator accepted from the vendee the purchase money, and agreed to hold it for, and to pay it to the plaintiff when the vendee's title became perfect. The testator at once deposited the money in a bank to his own account and mingled it with his own funds; the defendants have in like manner kept it in the bank to their own account. From 1867 to the date of this action both his and their bank accounts have occasionally fallen below the amount of the purchase money, but for all that appears to the contrary, either he or they could have made good the whole sum upon demand. In 1888 the vendee's title became perfect, but the defendants refused to pay over the purchase money at that time and have since refused to do so. *Held*, there was no breach of trust until 1888, and that, therefore, the plaintiff

was entitled to interest on the purchase money from this date only. *Mathewson* v. *Davis et al.*, 61 N. E. 68 (Ill June, 1901).

The court bases its decision on two facts: First, that the plaintiff did not prove that the testator or the defendants were at any time financially unable "to meet the obligation," and, secondly, that the original parties to the trust never intended that interest should be paid. The first seems immaterial; to argue that the plaintiff did not prove a breach of trust, before the flagrant breach in 1888, because he did not prove that the testator was, or the defendants were, at any time financially unable to pay over an amount equal to the trust fund, is irrelevant. As to the second, it seems sufficient to say that the original parties never expected that the testator or the defendants would commit a breach of trust by destroying the trust *res* in mingling it with their own funds and in using it for their own profit. That both he and they did this is evident. The decision is wrong in principle and is opposed to the weight of authority. See Lewin's Law of Trusts (9th Ed,), pp. 315, 376; Pomeroy's Equity Jurisprudence (2d Ed.), § 1076.

TRUSTS - FOLLOWING TRUST FUNDS. The plaintiff gave money for a particular purpose to S, her agent. S gave the money in the course of an illegal transaction to the defendant, who later returned part of it. *Held*, S was a trustee. Since the defendant had not received the money innocently and for value he was liable to the plaintiff even for that part returned to S. *Grain Exchange* v. *Bendinger*, 109 Fed. 926 (C. C. A. June, 1901).

The plaintiff could claim the property in the hands of the defendant, he having acquired title subject to the plaintiff's equity, because of the illegality of the transaction. Nor need the *cestui que trust* point out the specific *res*, if the proceeds have come into his hands so as to increase his assets. *People* v. *Danesville Bank*, 39 Hun, 187 (1886); 2 Perry on Trusts, 5th edition, § 838.

The fact of repayment of part of the sum of money to the agent does not alter the case. If the return was a payment of a debt, the assets of the defendant were none the less increased. And if the return was not in payment of a debt, the defendant, by the receipt of the money, had been constituted a trustee for the plaintiff and was liable to him in an action of debt for the whole claim. Hill on Trustees, p. 518.

TRUSTS—SALE OF RES BY ORDER OF COURT—PURCHASE BY TRUSTEE. Where, in a suit for partition of certain lands, the plaintiff had brought action both as an individual and as a trustee, against the *cestui* and, at the sale which was decreed, the plaintiff bought in the land, sale being confirmed by the court, *held*, the trustee acquired a valid title, as the court in affirming the sale approved of the purchase by the trustee. *Corbin* v. *Baker*, 60 N. E. 332 (N. Y. May, 1901).

Ordinarily, where a trustee becomes the purchaser of the trust estate, such purchase, although there be no unfair dealing, will be set aside, on the ground that the personal interest of the trustee would interfere with the carrying out of his duties. *Davue* v. *Faunning*, 2 Johns. Ch. 252 (1816); *Fulton* v. *Whitney*, 66 N. Y. 548 (1876). In *Scholle* v. *Scholle*, 101 N. Y. 167 (1886), such disability on the part of the trustee was removed where the court on application permitted the trustee to become the purchaser, at the same time saying, that unless such permission were given, a sale to a trustee could be set aside on behalf of the *cestui que trust*. The principal case, while reaffirming the general doctrine and approving of the Scholle case, goes one step further, in holding that a confirmation of the sale upon a hearing of all the parties, has the same effect as the giving of permission to buy, and that the court "is presumed to have acted consciously in confirming the sale." Such a relaxation of the rule seems unwise as a matter of public policy, for in any case involving a fiduciary relation, the court ought to have all of the facts before it and should give an actual approval to such purchase.

TORTS—MASTER AND SERVANT—ADMISSIONS AGAINST INTEREST. The defendant corporation employed one Kaufmann "to look up and see to"

witnesses in a suit by the plaintiff against the corporation. *Held* (three dissenting), evidence that Kaufmann attempted to bribe the plaintiff's witnesses was admissible as tending to show that the defendant's case was weak and his witnesses dishonest. *Nowack* v. *Metropolitan Street Ry. Co.*, 60 N. E. 32 (N. Y. April, 1901).

By the great weight of authority, such evidence is admissible against a private person, although even if believed it is not conclusive against him. The leading case is *Moriaty* v. *Ry. Co.*, L. R. 5 Q. B. 314 (1870). This has been generally followed in this country. *Donahue* v. *People*, 56 N. Y. 208 (1874). There are conflicting decisions as to whether such evidence is admissible against a corporation when no authority was given for the agent's wrongful act. The principal case answers the question in the affirmative, which is in accordance with the weight of authority, and justifiable on grounds of public policy. *Railroad Co.* v. *McMahon*, 103 Ill. 455 (1882); but see, *contra*, *Green* v. *Town of Woodbury*, 48 Vt. 5 (1875).

The dissenting opinion is based on the proposition that, although a master is liable for the unauthorized tort of his servant when committed in the course of employment, this doctrine should not be extended to cases where the servant's act does no injury to any one. Without discussing the soundness of this ruling, it would seem to have little direct application to the present case, as the suit was not brought to recover damages for Kaufmann's alleged attempted subornation.

TORTS—NEGLIGENCE PER SE. It was *held* not to be negligence for the driver of a gentle horse to leave him untied and unattended on the side of a public highway, while the driver was upon the sidewalk loading goods into the wagon. *Belles* v. *Kellner*, 48 Atl. 1010 (N. J. April, 1901).

It is generally a question for the jury whether the driver has acted prudently under the circumstances in leaving his horse in a public street. *Southworth* v. *R. R. Co.*, 105 Mass. 342 (1870). But where the proof is clear that the horse was of a quiet disposition and the driver had no reason to apprehend any injury, the rule of the principal case is applicable. *Wasmer* v. *R. R. Co.*, 80 N. Y. 212 (1880); *Reed* v. *Southern Express Co.*, 22 S. E, 133 (Ga. 1894). On the other hand, where the horse is left near a railroad track, as in *Morris* v. *Kohler*, 41 N. Y. 42 (1869), or near a young shade tree, as in *Lane* v. *Lamke*, 53 App. Div. 395 (N. Y. 1900), or for an unreasonable time, as in *Lynch* v. *Nurdin*, 4 P. & D. 672 (1841), there is a *prima facie* case of negligence.